Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-1368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

Denis McInerney*
Allen S. Joslyn
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner W.R. Grace & Co.

**Counsel of Record*

April 10, 1991

[Additional Counsel For Petitioners Appear On Inside Cover]

Michael I. Otchet*
ARMSTRONG WORLD INDUSTRIES
Liberty & Charlotte Streets
Lancaster, PA 17064
(717) 397-0611

and

John F. Kent
Nancy E. Campbell
MARKS, KENT & O'NEILL
2800 Two Mellon Bank Center
Suite 500
Philadelphia, PA 19102-2396
(215) 564-6688

Attorneys for Petitioner Armstrong World Industries

Frederic L. Goldfein*
Leslie Anne Miller
GOLDFEIN & JOSEPH
Packard Building
17th Floor
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 977-9800

Attorneys for Petitioners Asbestos Corp. Ltd. and Bell Mines, Ltd.

Robert P. Corbin*
GERMAN, GALLAGHER & MURTAGH
200 South Broad Street
5th Floor
Philadelphia, PA 19102
(215) 545-7700

Attorneys for Petitioner Asten Group, Inc.

Glenn P. Callahan*
CALLAHAN, DELANY & O'BRIEN
The Bourse, Suite 900
South Fifth Street
Philadelphia, PA 19106
(215) 829-4210

and

Geoffrey Stern
ARTER & HADDEN
One Columbus
10 West Broad Street
Columbus, OH 43215
(614) 221-3155

Attorneys for Petitioner Basic, Inc.

Bernard E. Kueny, III*
Walter S. Jenkins
SWEENEY, SHEEHAN
& SPENCER, P.C.
1515 Market Street
19th Floor
Philadelphia, PA 19102
(215) 563-9811

Attorneys for Petitioner Dana Corporation

Thomas E. Seus*
Brenda M. Flock
KELLY, McLAUGHLIN & FOSTER
1700 Atlantic Building
260 S. Broad Street
Philadelphia, PA 19102
(215) 546-3210

Attorneys for Petitioner Empire Ace Insulation

William J. O'Brien*
Nancy J. Gellman
CONRAD O'BRIEN GELLMAN
DeSTEFANO & ROHN, P.C.
Sixteenth Floor
1515 Market Street
Philadelphia, PA 19102
(215) 864-9600

Attorneys for Petitioner Fibreboard Corp.

Jervis S. Finney*
OBER, KALER, GRIMES
& SHRIVER
120 East Baltimore Street
Baltimore, MD 21202-1643
(301) 685-1120

Attorneys for Petitioner GAF Corporation

Thomas W. Kirby*
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

and

Patrick J. Hagan
KINCAID, GIANUNZIO, CAUDLE
& HUBERT
P.O. Box 1828
Oakland, CA 94604-0828
(415) 465-5212

Attorneys for Petitioner Kaiser Cement Corp.

James D. Crawford*
Charles R. Bruton
Rolin P. Bissell
SCHNADER, HARRISON, SEGAL
& LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA 19103
(215) 751-2000

Attorneys for Petitioner Pfizer Inc.

Alan Klein*
COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
22nd Floor, PSFS Building
12 South 12th Street
Philadelphia, PA 19107-3981
(215) 922-1300

Attorneys for Petitioners Georgia-Pacific Corp. and Uniroyal, Inc.

Andrew Trevelise
REED, SMITH, SHAW & McCLAY
One Liberty Place
1650 Market Street
Philadelphia, PA 19103
(215) 851-8100

and

Albert P. Lenge*
DANAHER, TEDFORD, LAGNESE
& NEIL
60 Washington Street
Hartford, CT 06106
(203) 247-3666

Attorneys for Petitioner Pittsburgh Corning Corp.

Jonathan Wheeler**
WHEELER & BISHOP
100 North 17th Street
15th Floor
Philadelphia, PA 19103
(215) 568-2900

Attorneys for Petitioner Rockwool Manufacturing Co.

Joseph T. Mallon*
DUNN, HAASE, SULLIVAN, MALLON, CHERNER & BROADT
216 South Orange Street
Media, PA 19063
(215) 565-9600

Attorneys for Petitioner Wilkin Insulation

William H. Black, Jr.*
Stephen J. Imbriglia
HECKER, BROWN, SHERRY & JOHNSON
1700 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19102
(215) 665-0400

Attorneys for Petitioner U.S. Mineral

**Counsel of Record for this Petitioner*

***Counsel of Record in the Process of Application for Supreme Court Bar Membership*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1368

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

---

1. Respondents apparently misinterpret this Petition as an attempt to have this Court order the Third Circuit to issue a writ of mandamus (Br. Opp. at 2, 7). Instead, the "question presented" is the correctness of the Third Circuit's ruling "that, as a matter of law, it was powerless to consider" the mandamus petition (Petition at p. i). In other words, the precise issue here raised is much broader and more basic—*i.e.*, can a court of appeals *ever* review by mandamus an order

certifying or decertifying a class action, or are such orders instead insulated from mandamus review? While respondents argue that "the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling" (Br. Opp. at 5), it is quite clear that is precisely what the Third Circuit did. During argument, Judge Aldisert flatly rejected W.R. Grace's counsel's suggestion that *Demasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), permitted mandamus to review a class status ruling in "an extraordinary case" (Petition at 8, 29a-30a). The opinion below states that *Demasi* "*precludes* the use of mandamus to reverse the grant or denial of a class certification" (921 F.2d at 1341, reprinted in Petition at 9a, emphasis added). Indeed, Judge Aldisert wrote that the panel was publishing its opinion for the express purpose of emphasizing this holding. *Id.* These facts, and the fact that the Third Circuit made no attempt to address the issues raised by the mandamus petition (*e.g.*, the radically changed circumstances since the original class certification and the irreparable injury that threatened defendants), demonstrate that the court below held, as it stated, that it could not review by mandamus the class certification order.

2. Respondents attempt to dismiss the many conflicting decisions of other courts of appeals by asserting that these cases are no longer valid precedent after this Court "clarified the rules about mandamus in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980)" (Br. Opp. at 6). But neither decision changed existing law with respect to the availability of mandamus, *Will*, *supra* at 661-62; *Allied Chemical*, *supra* at 34-36, nor were they so understood by later courts of appeals decisions cited in our Petition.[1]

---

1 Respondents argue that *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), and *In re Bendectin Products Liability Litigation*, 749

3. Although the basic issue raised here does not require this Court to determine whether the writ of mandamus should have been issued, the circumstances surrounding that application illustrate the need to maintain the availability of mandamus review for appropriate cases. In their response, respondents contend that the trial court's Pretrial Order No. 235 governing the Phase I trial structure was "not before the Third Circuit on the mandamus petition" (Br. Opp. at 8 n.15). Even assuming *arguendo* that this Court would ignore important rulings of the trial court subsequent to the Third Circuit's decision,[2] respondents' argument is simply mistaken as a matter of fact. Pretrial Order No. 235 was subsequent to the filing of the original mandamus petition but it was added to the record in the reply submission to demonstrate the trial court's ongoing inability to deal with the requirements of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Order No. 235 was in fact quoted extensively in the dissenting opinion of Judge Cowen in *In re School Asbestos Litigation*, 921 F.2d 1310, 1321 (3d Cir. 1990), the companion decision on subject matter jurisdiction filed the same day as the decision refusing to consider the mandamus petition here.

4. While the trial court is on the verge of commencing a monumental class action trial that threatens violation of defendants' constitutional rights, the respondents argue that review of the class certification would be "wastefully prema-

---

F.2d 300 (6th Cir. 1984), are "manifestly distinguishable" because they involved review of certifications of mandatory classes for damages whereas this case involves an opt-out class action (Br. Opp. at 7 & n.14), but offer no explanation as to why The All Writs Act, 28 U.S.C. § 1651, should apply differently to these two types of class actions. With respect to *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), respondents simply state that the case is "[a]lso distinguishable" without explaining how (Br. Opp. at 7 n.14).

2 Respondents' argument is particularly anomolous insofar as their opposition to the diversity jurisdictional amount arguments raised by the petitioners in Nos. 90-1367 and 90-1378 rests largely on the significance they attribute to an order issued by the trial court after the decisions of the Third Circuit (Br. Opp. at 10, A-2).

ture" (Br. Opp. at 7). This argument borders on the cynical when contrasted with the Petition's demonstration that the Third Circuit's decision may well foreclose any appellate review at any stage (Petition at 9, 16-17). Accordingly, this may be the Court's only opportunity to review this important issue. If it does not, future petitions for mandamus with respect to class certification orders will not be brought, or if brought will not be considered, at least in the Third Circuit.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the writ of certiorari should issue.

Dated: New York, New York
April 10, 1991

Respectfully submitted,

Denis McInerney*
Allen S. Joslyn
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
W.R. Grace & Co.

**Counsel of Record*

AND ON BEHALF OF

Michael I. Otchet*
ARMSTRONG WORLD INDUSTRIES
Liberty & Charlotte Streets
Lancaster, PA 17064
(717) 397-0611

and

John F. Kent
Nancy E. Campbell
MARKS, KENT & O'NEILL
2800 Two Mellon Bank Center
Suite 500
Philadelphia, PA 19102-2396
(215) 564-6688

Attorneys for Petitioner Armstrong World Industries

Glenn P. Callahan*
CALLAHAN, DELANY & O'BRIEN
The Bourse, Suite 900
South Fifth Street
Philadelphia, PA 19106
(215) 829-4210

and

Geoffrey Stern
ARTER & HADDEN
One Columbus
10 West Broad Street
Columbus, OH 43215
(614) 221-3155

Attorneys for Petitioner Basic, Inc.

Frederic L. Goldfein*
Leslie Anne Miller
GOLDFEIN & JOSEPH
Packard Building
17th Floor
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 977-9800

Attorneys for Petitioners Asbestos Corp. Ltd. and Bell Mines, Ltd.

Bernard E. Kueny, III*
Walter S. Jenkins
SWEENEY, SHEEHAN & SPENCER, P.C.
1515 Market Street
19th Floor
Philadelphia, PA 19102
(215) 563-9811

Attorneys for Petitioner Dana Corporation

Robert P. Corbin*
GERMAN, GALLAGHER & MURTAGH
200 South Broad Street
5th Floor
Philadelphia, PA 19102
(215) 545-7700

Attorneys for Petitioner Asten Group, Inc.

Thomas E. Seus*
Brenda M. Flock
KELLY, McLAUGHLIN & FOSTER
1700 Atlantic Building
260 S. Broad Street
Philadelphia, PA 19102
(215) 546-3210

Attorneys for Petitioner Empire Ace Insulation

William J. O'Brien*
Nancy J. Gellman
CONRAD O'BRIEN GELLMAN
DeSTEFANO & ROHN, P.C.
Sixteenth Floor
1515 Market Street
Philadelphia, PA 19102
(215) 864-9600

Attorneys for Petitioner
Fibreboard Corp.

Jervis S. Finney*
OBER, KALER, GRIMES
& SHRIVER
120 East Baltimore Street
Baltimore, MD 21202-1643
(301) 685-1120

Attorneys for Petitioner
GAF Corporation

Thomas W. Kirby*
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

and

Patrick J. Hagan
KINCAID, GIANUNZIO, CAUDLE
& HUBERT
P.O. Box 1828
Oakland, CA 94604-0828
(415) 465-5212

Attorneys for Petitioner
Kaiser Cement Corp.

James D. Crawford*
Charles R. Bruton
Rolin P. Bissell
SCHNADER, HARRISON, SEGAL
& LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA 19103
(215) 751-2000

Attorneys for Petitioner Pfizer Inc.

Alan Klein*
COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
22nd Floor, PSFS Building
12 South 12th Street
Philadelphia, PA 19107-3981
(215) 922-1300

Attorneys for Petitioners
Georgia-Pacific Corp. and
Uniroyal, Inc.

Andrew Trevelise
REED, SMITH, SHAW & McCLAY
One Liberty Place
1650 Market Street
Philadelphia, PA 19103
(215) 851-8100

and

Albert P. Lenge*
DANAHER, TEDFORD, LAGNESE
& NEIL
60 Washington Street
Hartford, CT 06106
(203) 247-3666

Attorneys for Petitioner
Pittsburgh Corning Corp.

Jonathan Wheeler**
WHEELER & BISHOP
100 North 17th Street
15th Floor
Philadelphia, PA 19103
(215) 568-2900

Attorneys for Petitioner
Rockwool Manufacturing Co.

Joseph T. Mallon*
DUNN, HAASE, SULLIVAN,
MALLON, CHERNER & BROADT
216 South Orange Street
Media, PA 19063
(215) 565-9600

Attorneys for Petitioner
Wilkin Insulation

William H. Black, Jr.*
Stephen J. Imbriglia
HECKER, BROWN, SHERRY
& JOHNSON
1700 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19102
(215) 665-0400

Attorneys for Petitioner
U.S. Mineral

**Counsel of Record for this Petitioner*

***Counsel of Record in the Process of Application for Supreme Court Bar Membership*